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No. 18

In the Supreme Court of the United States

October Term, 1965

UTAH PIE COMPANY, *Petitioner*,

v.

CONTINENTAL BAKING COMPANY, CARNATION COMPANY and PET MILK COMPANY, *Respondents*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT CARNATION COMPANY

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SUBJECT INDEX

	Page
QUESTION PRESENTED	1
STATEMENT OF THE CASE	2
ARGUMENT	8
CONCLUSION	17

TABLE OF AUTHORITIES CITED

Cases

Anheuser-Busch, Inc. v. FTC, 289 F.2d 835 (1961) 11, 12

Balian Ice Cream Co. v. Arden Farms Co., 231 F.2d 356 (1955) 11

Brown Shoe Company v. United States, 370 U.S. 294 (1962) 9

E. B. Muller Co. v. FTC, 142 F.2d 211 (6th Cir. 1944) 13

Maryland Baking Co. v. FTC, 243 F.2d 716 (4th Cir. 1957) 14, 15

Moore v. Mead's Fine Bread Co., 348 U.S. 115 (1954) 11, 12

National Dairy Products Corp. v. United States, 1965 Trade Cas. §71541 (8th Cir. 1965) 13

United States v. Singer Mfg. Co., 374 U.S. 174 (1963) 9

Statutes

15 U.S.C. §18(a) 2

15 U.S.C. §15 2

No. 489

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UTAH PIE COMPANY, *Petitioner,*

v.

CONTINENTAL BAKING COMPANY, CARNATION COMPANY and PET MILK COMPANY, *Respondents*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT CARNATION COMPANY

QUESTION PRESENTED

Whether the Court of Appeals erred in holding, in a primary line geographical price discrimination case, that the plaintiff, which had increased its sales, profits and share of the market in competition with Carnation, which had lost both volume and market share in that market, had failed to produce sufficient evidence to go

to the jury on the issue of whether the effect of Carnation's different prices in different and unrelated markets was such as to constitute a violation of section 2(a) of the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. §13(a).

STATEMENT OF THE CASE

This case originally was a suit for damages under section 4 of the Clayton Act, 38 Stat. 731, 15 U.S.C. §15, brought by Utah Pie Company against three of its competitors: Continental Baking Company, manufacturer of Morton brand frozen fruit pies; Carnation Company, manufacturer of Simple Simon brand frozen fruit pies; and Pet Milk Company, manufacturer of Pet Ritz brand and Swiss Miss brand frozen fruit pies. Plaintiff claimed damages for an alleged conspiracy of all three of the defendants in violation of section 1 of the Sherman Act and alleged separate and individual violation by each of the defendants of section 2(a) of the Robinson-Patman Act. The jury returned a verdict for the defendants on the Sherman Act conspiracy charge but returned verdicts, based on a complicated allocation of damages chart introduced by plaintiff, against each of the defendants individually on the Robinson-Patman charges. Petition, Appendix A, pp. 2-3.[1]

On appeal,[2] the Court of Appeals for the Tenth Circuit reversed as to each of the individual Robinson-

[1] The opinion of the U.S. Court of Appeals for the Tenth Circuit, printed in full in Appendix A to the Petition, is cited hereinafter as "App. A," by page.

[2] No appeal was taken by Utah Pie from the verdict on the Sherman Act claim.

Patman Act claims on the ground the evidence was insufficient to support the verdicts in favor of Utah Pie (App. A, p. 4) without considering any of the several other grounds urged for reversal.

As noted by the Court of Appeals:

> Utah Pie's conspiracy claim and §2(a) claims and Continental's counterclaim were all tried at the same time. The portions of the evidence pertinent to all of such claims and the portions pertinent only to a particular claim were commingled and presented to the jury in mass. The jury's task of determining what evidence was pertinent to all of the claims and segregating those portions of the evidence pertinent only to the particular claims, respectively, was a most difficult if not an impossible one. Indeed, we found it very difficult so to do, when we had the printed transcript of the oral evidence and the written exhibits (either original or reproduced) before us, the benefit of the written briefs, and were able to proceed with due deliberation. [App. A, p. 73]

Petitioner's statement of the case and questions presented, despite the disclaimer in the footnote on page 6 of the Petition, tends to perpetuate this confusion and treats the case as involving the combined actions of the three defendants, using the plural possessive as if every act of each individual defendant was the act of all. Such is not the record.

As to Carnation, the essential facts of record are set forth in the opinion of the Court of Appeals (App. A, pp. 40-51, 66-69), and will not be repeated here. However, in two areas in particular petitioner's statement of "facts" with respect to Carnation is not sup-

ported by the record. These deal with alleged losses on pie sales and the claim that these losses were "planned in advance."

With respect to the former, the Court of Appeals stated:

> Carnation's receipts from sales of frozen pies in the Salt Lake City market exceeded its direct costs, that is, manufacturing, spoilage and transportation costs. It probably also exceeded direct costs, if selling costs were included therein, but on the record before us we can only ascertain with certainty whether its receipts from sales exceeded direct costs, with selling costs included, as to apple pie sales. [Apple is the price leader and by far greatest in volume.] Carnation's offering prices for apple pie exceeded its direct costs, that is, manufacturing, spoilage, transportation and selling costs in each of the 44 months herein involved, except in February and March, 1960. In those months, its lowest offering price was $3.30 per dozen and its direct costs were $3.39 per dozen. Moreover, its average direct costs for the 44-month period were: manufacturing — $2.934, spoilage—$0.02, transportation — $0.35, and selling — $0.282, or $3.586 per dozen. Its average lowest offering price for apple pie in such period was $3.915 per dozen. Hence, its average lowest offering price exceeded such average direct costs by $0.329 per dozen. [App. A, pp. 50-51.]

In addition, the record showed that these "losses," i.e. after allocation of general company overhead, were not confined to the Salt Lake market where plaintiff operated,[3] but were incurred in varying degrees in

[3] Petitioner overstates its market area at pages 7 and 9 of its brief in support of its Petition for a Writ of Certiorari. As the Court of Appeals noted, petitioner's sales outside the Salt Lake City market (Utah and Southern Idaho) "were negligible." App. A, pp. 9-10.

numerous other markets where Utah Pie made no attempt to sell. The Court of Appeals found specifically:

> Carnation did not make up losses on sales of frozen pies in the Salt Lake City market area through profits on sales of frozen pies in other market areas. [App. A, p. 50.]

As to "planned" losses, petitioner states at page 21 of its brief that "Carnation planned its losses in the intermountain area in advance." The citations given are R. 405-406 and Pl. Ex. 5 (R. 406, 407), the former being merely the identification through Carnation's controller of its frozen food division, C. V. Bye, of Exhibit 5. Bye stated this document was his *forecast* based upon information furnished him as to estimated sales and costs. R. 403-404. Petitioner also quotes some figures for 1959. The remainder of the forecast for 1959, not quoted by petitioner, included some $150,000 of losses predicted for the Texas-Louisiana and Midwest markets (Pl. Ex. 5, p. 12). The 1958 forecast for Salt Lake City was for a profit, while losses were predicted in some eight other markets (Portland, New Mexico, Houston, San Antonio, Oklahoma City, Wichita, Des Moines, and St. Paul) for that year.[4] In 1960 and subsequent years the forecasts were divided only as to eastern and western areas and varied in each area from year to year. See, e.g., pp. 1, 8, 5 of Pl. Ex. 5. Thus the claim that Carnation "planned" in advance losses in the Intermountain area is a misrepresentation of the record. After reviewing the rec-

[4] The 1958 budget is found in two places in Pl. Ex. 5. Part is contained at pp. 13-14 of the exhibit, and part is to be found approximately thirty pages from the exhibit's end.

ord, the Court of Appeals stated with respect to this claim of planned losses:

> Carnation made forecasts of losses in different markets from year to year, including the Salt Lake City market area, based on the experience of the previous year and future expectations, but there was no pattern of such forecasts. They varied from year to year and market to market. [App. A, p. 51.]

In a third area, alleged geographic differences in price, petitioner's version of the facts differs from those found by the Court of Appeals after an exhaustive analysis of the record. At the trial Utah Pie's counsel based his case on Carnation's alleged low prices in Salt Lake City and higher prices in Los Angeles, where Carnation's plant is located. As to this claim the Court of Appeals found:

> There was no proof of a price difference by Carnation in the Salt Lake City market and Los Angeles market, the original theory advanced by Utah Pie. [App. A, p. 47.]

Petitioner, at page 23 of its brief, now claims higher prices in San Francisco,[5] a "wholly unrelated market" with "substantial differences in competitive conditions." App. A, p. 47. Petitioned bases this claim on a comparison of *list* prices in San Francisco, before deducting advertising allowances granted there with *net* prices in Salt Lake, after deducting promotional allowances granted there. As to this approach, the Court of Appeals found:

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[5] Petitioner's assertion that Carnation's net San Francisco prices were never lower than its Salt Lake prices is not supported by the record. See Appendix VII to the opinion of the Court of Appeals at pp. 85-86 of Appendix A to the Petition.

> Many frozen pie manufacturers gave rebates from their list of offering prices in the form of advertising allowances for stated periods, upon proof of advertising by the purchaser on tear sheets furnished to the purchaser for that purpose. There was no requirement as to size of advertisement, and the advertisement needed only to be run one time to qualify the purchaser for an allowance. The dollar amount of the allowance was not determined by the quantity of frozen pies purchased, nor by the size or frequency of the advertisement, and the small purchaser who advertised received the same allowance per case as the large purchaser. In effect, the advertising allowance is a discount and fixes the net per case price of the pies purchased. [App. A, p. 13.]

and in its comparisons (see App. A, pp. 45-48, Appendix VII) the Court used the effective "absolute" prices rather than non-effective list prices in each market.

Based on its exhaustive analysis of the record, the Court of Appeals found that Utah Pie Company outfought, outsold and underpriced its competitors in the Salt Lake market, particularly Carnation, and that it prospered. App. A, pp. 47-50. From this record the Court of Appeals concluded that the fact that Carnation charged different prices in different markets in which it was competing was not alone sufficient to constitute a violation of section 2(a) of the Robinson-Patman Act (App. A, pp. 52-53), and found that Carnation's pricing practices did not, as to the Salt Lake City market in general and Utah Pie Company in particular, injure or weaken competition or tend to create a monopoly or that there was a reasonable possibility that it would do so in the future. App. A, p. 69.

ARGUMENT

In essence this case and the decision of the Court of Appeals which is here sought to be reviewed is a factual one. The Court of Appeals expressly declined to consider (App. A, p. 4) any of the various grounds for reversal before it save one:

> . . . [W]hether the evidence, when viewed in a light most favorable to Utah Pie and it is accorded the benefit of all the inferences the evidence fairly supports, was sufficient to support a finding as to each defendant that it by price differences or other acts had substantially lessened competition, tended to create a monopoly, or injured, destroyed, or prevented competition with it, or there was a reasonable possibility that by such acts it would do so in the future. [App. A, p. 57.]

After reviewing in great detail and at considerable length the record as to each of the defendants, the Court of Appeals concluded that the facts "speak for themselves" (App. A, p. 58) and did not support the verdicts.

Despite such smear labels as "dangerous anomaly in the law," "dangerous precedent" and "massive mistake," the petitioner here seeks to have this court review a lengthy and confusing record[6] on the routine issue of whether the plaintiff produced sufficient evidence to go to the jury — an issue involving neither novel or unsettled issues of law nor a conflict with decisions of this Court or any Court of Appeals.

Such a review of a review of a record compounds

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[6] The record consists of 1322 pages of transcript and more than 200 documentary exhibits.

the problem already facing this court in considering direct appeals of government antitrust cases under the Expediting Act. See *United States v. Singer Mfg. Co.*, 374 U.S. 174, 175 (1963). All this petition presents for this court to decide is whether it wishes to undertake the task of reviewing a lengthy record, already exhaustively analyzed by the Court of Appeals, to determine whether that court was correct in its conclusion that on the record petitioner had not met its burden of proof.

As Mr. Justice Harlan stated in his separate opinion in *Brown Shoe Company v. United States*, 370 U.S. 294, 364 (1962):

> At this period of mounting dockets there is certainly much to be said in favor of relieving this Court of the often arduous task of searching through voluminous trial testimony and exhibits to determine whether a single district judge's findings of fact are supportable. The legal issues in most civil antitrust cases are no longer so novel or unsettled as to make them especially appropriate for initial appellate consideration by this Court, as compared with those in a variety of other areas of federal law.

In brief, the record shows that "throughout the period 1958 to 1962, inclusive, Utah Pie was a vigorous, active, healthy and effective competitor in the Salt Lake City market" (App. A, p. 69), and that both Carnation's volume and its market share in that market were less at the end of the period than in 1958 when Utah Pie captured 66 percent of the market by undercutting all of its competitors. In addition, by use of private labels and its price cutting tactics, Utah Pie

captured from Carnation the business of the major buyers. The following table taken from Ex. 35[7] (R. 973, 976) shows that the Salt Lake market was a highly competitive one and that both Utah Pie's ability and that of other sellers in the market was not injured or weakened, and that the only tendency toward monopoly was that of Utah Pie itself:

Per Cent Market Share, Salt Lake City Market

	1958	1959	1960	1961
Utah Pie	66.5	34.3	45.5	45.3
Carnation	10.3	8.6	12.1	8.8
All other sellers	23.2	57.1	42.4	45.9

To claim, as petitioner does here, that the Court of Appeals' analysis of the record "effectively repeals" section 2(a) of the Robinson-Patman Act wholly ignores or misrepresents the facts that the court found spoke for themselves.

In an attempt to transform this routine review of the record by the Court of Appeals into an issue within the scope of the reasons for granting certiorari under Rule 19 of this Court, petitioner has set forth some ten different "reasons." Of these, only a few relate to the Carnation case and these, when analyzed, are a mere camouflage.

We deal specifically with each of these asserted reasons:

1. Petitioner's first claim is that the decision of the Court of Appeals is in conflict with this Court's

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[7] Plaintiff introduced this same exhibit as its Pl. Ex. 62; R. 398, 399.

opinion in *Moore v. Mead's Fine Bread Co.*, 348 U.S. 115 (1954). This claim must be based on some other record, not the record in the case at bar — at least so far as it relates to Carnation.

The Court of Appeals held:

> We do not think Congress intended that nationwide sellers in different, separate, distinct, heterogeneous and unrelated markets, with different competitive conditions, must sell at the same price levels in each of such markets. [App. A, p. 58.]

This holding is in accordance with the decisions of the Seventh Circuit in *Anheuser-Busch, Inc. v. FTC*, 289 F.2d 835 (1961) and of the Ninth Circuit in *Balian Ice Cream Co. v. Arden Farms Co.*, 231 F.2d 356 (1955), *cert. denied* 350 U.S. 991 (1956). The Tenth Circuit Court of Appeals went on to state:

> However, we think it did intend that such a seller should not indulge in price differences that had a reasonable possibility of substantially lessening competition or tending to create a monopoly, or to injure, destroy, or prevent competition with a person who grants or knowingly receives the benefit of such price differences. But it did not intend to proscribe a seller from fairly meeting competition. [App. A, p. 58.]

This statement is in accordance with the decision of this Court in *Moore v. Mead's Fine Bread Co., supra.* In *Moore v. Mead* the interstate seller cut its price in only one market — where the plaintiff sold — with the intent to counter a boycott instigated by the plaintiff. Here Carnation's prices varied from market to market and from time to time in response to varied competitive

conditions and were not directed at anyone. App. A, p. 42 and Appendix VII.

Other than in the Salt Lake market Carnation is larger than the Utah Pie Company, but that fact is not sufficient to establish predatory intent. As stated by the Court of Appeals for the Seventh Circuit in *Anheuser-Busch, Inc. v. FTC, supra,* p. 843: "Nor are we convinced that guilt of an alleged malefactor can be proved by only its bigness."

While petitioner uses the plural possessive in the various charges it makes under this point, it has failed to point out where in the record with respect to Carnation it supports those charges or that the Court of Appeals' analysis of that record was in error, compels a different result or departs from the rulings of this court in *Moore v. Mead, supra.* The quotation by petitioner from *Moore v. Mead* (Petition, p. 41) dealt with the ability, shown in that case, of the defendant to support its local price cutting through profits gained elsewhere. In the case at bar the court found precisely the opposite state of facts. It said:

> Carnation did not make up losses on sales of frozen pies in the Salt Lake City market area through profits on sales of frozen pies in other market area. [App. A, p. 50.]

2. Petitioner's second point deals with "respondents' intent." This use of the plural possessive is apparently an attempt to resurrect the Sherman Act conspiracy charge on which it lost to the jury. Petitioner has pointed to no "significant evidence" as to Carnation's "intent" in any respect. Petitioner's claimed evidence of intent as to Carnation is alleged sales in petitioner's

"trading area," "below . . . cost" and "planned . . . in advance." Petition, p. 29.

Petitioner's claim is a gross exaggeration of its trading area (*supra*, p. 3, note 3), a misrepresentation of the record as to "planned" losses (*supra*, p. 5-6), and without substance as to sales below cost (*supra*, p. 4). In any event, sales below cost are not alone evidence of intent, *National Dairy Products Corp. v. United States*, 1965 Trade Cas. §71541 (8th Cir. 1965), particularly where the relationship of cost to price varies from market to market, *E. B. Muller Co. v. FTC*, 142 F.2d 211 (6th Cir. 1944).

3. Petitioner's third, fourth, fifth and sixth "reasons" deal with the Pet Milk Company, not Carnation.

4. Petitioner's assertion in its reason no. 7 that the Court of Appeals "relied upon its analysis of post-complaint market conditions" overlooks the reasoning of the Court of Appeals. It stated:

> We, of course, recognize that it was not necessary for Utah Pie, in order to make a case against a defendant, to prove that its actions had already lessened competition, or tended to create a monopoly, or injured, destroyed, or prevented competition with such defendant, and that it was sufficient for it to prove that it was reasonably possible that such actions would do so in the future. But if such action did not substantially lessen competition, or tend to create a monopoly, or injure, destroy, or prevent competition with any of the defendants during the almost four years here involved; and regard be given also to Utah Pie's substantial volume increase in 1962 and the sharp volume decrease in 1962 of two of the defendants from their 1961 volume, it

> would seem to be quite unlikely that such a result would probably flow from such actions in the future. [App. A, pp. 59-60.]

Again at page 69, it stated:

> The evidence clearly shows that throughout the period 1958 to 1962, inclusive, Utah Pie was a vigorous, active, healthy and effective competitor in the Salt Lake City market and refutes a finding that Carnation, by price differences or other acts, had substantially lessened competition, or tended to create a monopoly, or injured, destroyed, or prevented competition with it in the Salt Lake City market, or that there was a reasonable possibility that Carnation, by price differences or other acts would do so in the future, or that Carnation had taken or would take in the future any appreciable amount of frozen pie business from Utah Pie.

It is clear that the Court's reliance in making its determination was on the basic four-year period, and that the available evidence of post-complaint competitive activity merely confirmed its conclusion that there was nothing in Carnation's conduct during the period 1958-1961 that tended to injure either Utah Pie Company or competition in the Salt Lake market or was likely to do so in the future.

5. Petitioner's assertion in reason 8(a) that the decision of the Tenth Circuit in the case at bar is "in flat conflict" with the decision of the Fourth Circuit in *Maryland Baking Co. v. FTC*, 243 F.2d 716 (4th Cir. 1957) is without foundation in the record. In that case the Fourth Circuit found:

> (a) That the defendant cut its prices 25 percent on a particular type of ice cream cone manufactured

by its local competitor. No such price cuts were made by Carnation in the Salt Lake market or anywhere else. See Appendix VII to the opinion.

(b) That the price cuts were made by the defendant in a limited area where its small competitor operated. The record shows that Carnation's prices varied from market area to market area as competitive conditions in "different, separate, distinct, heterogeneous and unrelated markets" varied. *Ibid.*; App. A, p. 58.

(c) The defendant maintained higher prices in other markets where it operated and its local competitor did not. The same statement made under (b) above applies here. In addition, the court found expressly that Carnation did not make up losses on sales of frozen pies in the Salt Lake City market area through profits of sales of frozen pies in other market areas. App. A, p. 50.

(d) The defendant in the *Maryland Baking* case cut its prices for the purpose of driving its local competitor out of business. There is no such evidence in the case at bar as to Carnation.

(e) The effect of the defendant's price cutting activities in the *Maryland Baking* case was to deprive its competitor of about one-half of its volume. In the case at bar Utah Pie's volume increased every year, while Carnation's volume and market share was less in 1961 at the end of the period than it had been in 1958 when Utah Pie captured 66 percent of the market. App. A, pp. 12, 49.

6. Reasons 8 (d) and 9 do not apply to Carnation.

7. In reason no. 10, petitioner states:

> Respondents were entitled to a reversal of the judgment entered upon the jury verdict in the Trial Court *only* if not supported by substantial evidence, giving to petitioners the benefit of all conflicts in the evidence and all the presumptions and inferences that could reasonably be drawn from the evidence, considered in the light most favorable to petitioners. [Petition, p. 51.]

The Court of Appeals applied that same test to its analysis of the record to the case at bar. It stated:

> A trial court, in determining whether it will grant a motion for a directed verdict or for judgment n.o.v., should view the evidence in a light most favorable to the party against whom the motion is directed and give such party the benefit of all the inferences which the evidence reasonably supports, even though contrary inferences might reasonably be drawn therefrom, and if the evidence and inferences, so viewed and considered, are of such a character that reasonable men in the exercise of a fair and impartial judgment may reach different conclusions, the motion should be denied. In reaching its determination "the court may not pass on the weight of the evidence or" decide "where the preponderance of the evidence lies." With the exception of clearly incredible evidence, the court should not consider or pass on the credibility of witnesses and should accept as true the evidence in favor of the party against whom the motion is directed. In determining whether the motions by the defendants in the instant cases should have been granted, we have so viewed and considered the evidence. [App. A, pp. 51-52.]

At page 57 it stated:

> The primary question presented by each of

these appeals, except the one from the judgment against Continental on its counterclaim, is whether the evidence, when viewed in a light most favorable to Utah Pie and it is accorded the benefit of all the inferences the evidence fairly supports, was sufficient to support a finding as to each defendant that it by price differences or other acts had substantially lessened competition, tended to create a monopoly, or injured, destroyed, or prevented competition with it, or there was a reasonable possibility that by such acts it would do so in the future.

How the Court of Appeals deprived petitioner of a jury trial when it applied the very test of appellate review petitioner concedes is applicable is not apparent.

CONCLUSION

The decision of the Court of Appeals in its review and analysis of the factual record introduced in the court below was obviously correct. It passed on no new issue of law and applied only those well established yardsticks for judicial review that this court has recognized since its inception. The petition for certiorari should be denied.

Dated September 20, 1965.

Respectfully submitted,

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